

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW  
SACRAMENTO, CALIFORNIA

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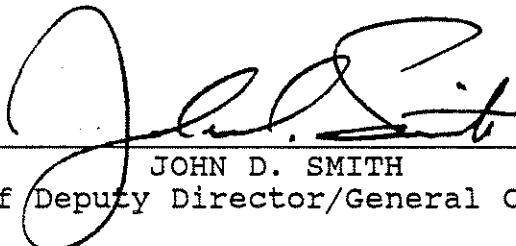
In re: )  
Request for Regulatory )  
Determination filed )  
by William T. Mayo, )  
concerning the Department )  
of Motor Vehicles' )  
"Driver Safety Manual"1 )

1987 OAL Determination No. 17  
[Docket No. 87-006] OF STATE  
OF CALIFORNIA

December 18, 1987

Determination Pursuant to  
Government Code Section  
11347.5; Title 1,  
California Administrative Code  
Chapter 1, Article 2

Determination by:

  
JOHN D. SMITH  
Chief Deputy Director/General Counsel  
Herbert F. Bolz, Coordinating Attorney  
Debra M. Cornez, Staff Counsel  
Bradley J. Norris, Staff Counsel  
Rulemaking and Regulatory  
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether the Department of Motor Vehicles' "Driver Safety Manual" is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Department of Motor Vehicles has failed to comply with the Administrative Procedure Act in establishing rules and procedures that implement, interpret, or make specific the Vehicle Code. The Office of Administrative Law further concludes, however, that the majority of the provisions of the "Driver Safety Manual" are either non-regulatory or are restatements of existing statutes, regulations, or case law.

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THE ISSUE PRESENTED <sup>2</sup>

The Office of Administrative Law ("OAL") has been requested to determine whether the Department of Motor Vehicles' ("Department") "Driver Safety Manual" ("Manual") is a "regulation" as defined in Government Code section 11342, subdivision (b), and is therefore invalid and unenforceable<sup>3</sup> unless adopted as a regulation and filed with the Secretary of State in accordance with the Administrative Procedure Act ("APA")<sup>4</sup>.

THE DECISION <sup>5,6,7,8</sup>

The Office of Administrative Law finds that:

- I. The "Driver Safety Manual" (1) is not a "regulation" as defined in the APA and (2) is not subject to the requirements of the APA insofar as it reiterates existing statutes, regulations, or case law.<sup>9</sup>
- II. Certain provisions of the "Driver Safety Manual"<sup>10</sup> which establish rules and procedures that implement, interpret, or make specific existing statutes, regulations, or case law (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) are therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the APA.

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I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The California Department of Motor Vehicles was created in 1931.<sup>11</sup> It is responsible for protecting the public interest and promoting public safety on the state's roads and highways. It also administers and enforces California Vehicle Code provisions concerning the granting, denying, suspending or revoking of drivers' licenses.<sup>12</sup>

Authority <sup>13</sup>

Vehicle Code section 1651 provides:

"The director [of the Department of Motor Vehicles] may adopt and enforce rules and regulations as may be necessary to carry out the provisions of this [Vehicle] code relating to the department.

"Rules and regulations shall be adopted, amended, or repealed in accordance with the [APA] . . . ."  
[Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."<sup>14</sup> Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.<sup>15</sup>

In any event, section 1651 of the Vehicle Code, quoted above, specifies that the Department's rulemaking is subject to the APA.

General Background

The following undisputed facts and circumstances have given rise to the present determination.

The Request for Determination here at issue was filed with OAL on April 24, 1987, by William T. Mayo. This Request concerns the Department's "Driver Safety Manual," which is 720 pages (and 21 chapters) in length. An earlier Request for Determination filed by Mr. Mayo, dated March 18, 1987, involved Chapter 12 of this Manual, and a Determination was issued on October 26, 1987, pertaining to that 67-page chapter of the Manual.<sup>16</sup> Since Chapter 12 of the Manual has already been reviewed in a previous Determination, this Determination will limit its scope of coverage to the remaining 20 chapters of the Manual, encompassing 653 pages.

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On November 23, 1987, the Department filed a Response to the Request with OAL. In this Response, the Department declared:

"It is the opinion of the Department of Motor Vehicles that the Driver Safety Manual does not contain unapproved regulations. This manual requires neither action nor inaction by any member of the public. It is a reiteration of relevant statutes, case law interpretations, and procedural instructions necessary to assure that the Department . . . has legally sufficient guidelines to follow in carrying out the intent of traffic safety programs established by California law."<sup>17</sup> [Emphasis added.]

#### Background Regarding the Manual

The Driver Safety Manual here at issue covers a number of varied functions of the Department with particular emphasis upon the functions of Department referees (hearing officers). A primary focus of the Manual is the topic of "hearings." The Department is required to provide a driver the opportunity for a hearing when it takes (or proposes to take) actions such as the revocation or suspension of the driving privilege, the imposition of terms of probation on the driving privilege, or the refusal to issue or renew a driver's license.<sup>18</sup>

In addition to hearings, the Manual covers other administrative procedures such as "re-examinations" (scheduled by the Department when it has reason to question whether an existing driving privilege should be suspended or revoked)<sup>19</sup> and "interviews" (scheduled upon the request of a driver who has already had his or her driving privilege suspended, revoked, or placed on probation and who seeks to modify or end the Department's earlier action).<sup>20</sup>

Chapters of the Manual pertaining to the general conduct and administration of hearings, re-examinations, and interviews by Department referees are the following:

- Chapter 1 -- Understanding the Record
- Chapter 2 -- Interviewing
- Chapter 3 -- Conducting a Re-examination
- Chapter 4 -- Conducting Informal Hearings
- Chapter 5 -- Conducting an Interview
- Chapter 6 -- Requesting Medical Information
- Chapter 7 -- Making Decisions
- Chapter 8 -- Reports and Paperwork
- Chapter 11 -- Formal Hearings
- Chapter 19 -- Rules of Evidence
- Chapter 20 -- Using Interpreters

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The Manual also covers several specialized types of hearings. Chapter 9 -- "Making a NOTS Presentation" pertains to group hearings conducted in connection with the Department's Negligent Operator Treatment System (NOTS). The NOTS scheme involves the automatic imposition of driving license probation, suspension, and/or revocation based upon a violation point count. Chapter 10 -- "Financial Responsibility Hearings" pertains to hearings involving issues of whether drivers or registered vehicle owners have satisfied compulsory financial responsibility laws. Chapter 13 -- "Class 1 and 2 Hearings" and Chapter 14 -- "Special Certificate Hearings" pertain to hearings involving the heightened licensing requirements applicable to drivers of specialized vehicles such as large trucks, school buses, ambulances, and farm labor vehicles.

Chapters 16, 17, and 18 of the Manual principally provide various types of background information for hearing referees. Chapter 16 -- "The Division of Driver Safety and Licensing" outlines the Department's history, programs, and functions as well as recent statutory enactments relevant to the referee. Chapter 17 -- "Background Readings" provides information for referees on such subjects as time management, interviewing, and writing. Chapter 18 -- "Physical and Mental Conditions" provides background information on common medical and mental conditions a referee might encounter in conducting hearings, re-examinations, and interviews.

Finally, two chapters of the Manual pertain to specialized programs of the Department. Chapter 15 -- "Traffic Safety Contacts" relates to public relations and public appearance activities of Department personnel. Chapter 21 -- "Traffic Violator Schools" involves the licensing of owners, operators, and instructors of traffic violator schools, schools which provide instruction to certain convicted and alleged traffic law violators.

## II. DISPOSITIVE ISSUES

There are two main issues before us:<sup>21</sup>

- (1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

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In pertinent part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

With respect to a substantial number of sections of the Manual, the answer to both parts of this inquiry is "no." These sections of the Manual are either non-regulatory<sup>22</sup> or are restatements of existing statutes, regulations, or case law. These sections do not (1) establish (or modify or supplement) a rule of general application, and (2) implement, interpret, or make specific the law enforced or administered by the Department or govern the Department's procedure.

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However, with respect to a number of sections of the Manual, the answer to the two-part inquiry described above is "yes." The rules contained in these sections are "regulations" within the meaning of Government Code section 11342, subdivision (b). An examination of these regulatory sections follows.

#### Rules or Standards of General Application

Examining the first part of the two-part inquiry, the rules which are set forth in the Manual are rules or standards of general application. For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>23</sup> The regulatory provisions of the Manual are just such rules.

For example, the rules set forth pertaining to the Department's hearings where driver alcoholism or use of alcohol is at issue are applicable to any person (i.e., any member of the class of drivers or aspiring drivers) who might be involved in a hearing to determine whether or not a license should be issued, renewed, revoked, suspended, or subjected to probationary terms for reasons of alcoholism or alcohol use. Likewise, rules set forth pertaining to the NOTS system are applicable to any member of the class of drivers facing license non-renewal, revocation, suspension, or probation for negligent operation of a vehicle under the NOTS point system. Similarly, rules set forth pertaining to traffic violator schools apply to any member of the class of persons seeking to own, operate, or instruct at such schools.

In conclusion, the rules set forth in the Manual are standards of general application -- standards applying to all members of a class, kind, or order.

#### Rules Which Implement, Interpret, or Make Specific the Law or Which Govern the Agency's Procedure

The second part of the two-part "regulation inquiry" is whether the rule implements, interprets, or makes specific the law enforced or administered by the agency or governs the agency's procedure. For purposes of illustrating the Manual sections which implement, interpret, or make specific or which govern the agency's procedure, we will focus upon four particular examples from the Manual. Additional regulatory provisions are discussed in footnote 24 to this Determination.<sup>24, 25</sup>

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Example No. 1 -- Section 2.309

Chapter 2 of the Manual, entitled "Interviewing," outlines interviewing guidelines applicable to hearings, re-examinations, and interviews conducted by Department referees. Section 2.309, entitled "Alcohol," discusses the content of hearings, re-examinations, and interviews involving drivers with suspected alcohol problems.<sup>26</sup>

This Manual section states:

"When interviewing a driver with a suspected alcohol problem, referees need the following information:

- . Driver's present use of alcohol.
- . Length of 'dry' period.
- . Number of times the driver stopped drinking. Circumstances which caused the driver to resume drinking.
- . Preferred alcoholic drink.
- . Amount of alcohol usually consumed.
- . Alcohol's effect on driving record.
- . Results of any blood alcohol tests. (A blood alcohol level of .20% or above usually indicates a serious alcohol problem.)
- . Driver's belief that an alcohol problem does or does not exist.
- . Any problems at home or at work caused by drinking.
- . Drinking habits of the driver's spouse and close friends. Their opinion of the driver's drinking habits.
- . Any arrests for public intoxication.
- . Any seizures, blackouts, or delirium tremens (DTs).
- . Any treatment received. When? What type?
- . Enrollment in AA or similar program.
- . Use of antabuse.
- . Use of drugs other than alcohol. When? Type and amount." [Original emphasis.]

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Examining the relevant statutes, Vehicle Code section 12805 provides, in part, that the Department shall not issue or renew a driver's license for a person

"[w]ho, because of alcoholism or excessive and chronic use of alcoholic liquors, is incapable of safely operating a motor vehicle, or who is addicted to the use of, or is an habitual user of, any drug to a degree that the person is rendered incapable of safely operating a motor vehicle."

Vehicle Code sections 13359 and 14250 incorporate this same standard regarding driver alcoholism or alcohol use as grounds for license revocation, suspension, or the imposition of terms of probation. These statutes do not further define the alcoholism or alcohol use standard set forth in Vehicle Code section 12805.

Vehicle Code sections 14100-14112 provide for informal and formal hearings<sup>27</sup> upon the Department's proposal to refuse to issue or renew a license or upon the Department's action (or proposed action) of license revocation, suspension, or the imposition of terms of probation. These hearing provisions do not specify particular inquiries or content of a hearing at which alcoholism or alcohol use is at issue.

Manual section 2.309 implements, interprets, and makes specific the provisions of Vehicle Code sections 12805, 13359, 14100-14112, and 14250. This Manual section sets forth specific areas of inquiry and content for a hearing where a suspected alcohol problem is at issue. The section clearly states that referees "need" the particular pieces of information detailed in the text of this section. This section also apparently sets forth the specific information which the Department considers relevant in making the decision regarding a license denial, renewal, revocation, suspension, or probation where a suspected alcohol problem is at issue, further implementing the Vehicle Code sections described above. In addition, section 2.309 "governs the agency's procedure" by supplementing the general rules presented in the Vehicle Code (and Government Code) for the taking of evidence at a Department hearing.

We also note that this Manual section sets forth a specific standard regarding blood alcohol tests -- "[a] blood alcohol level of .20% or above usually indicates a serious alcohol problem" (original emphasis) -- thereby further implementing the law governing hearings where suspected alcohol problems are at issue.

We conclude that section 2.309 of the Manual is a "regulation" and must be adopted pursuant to the APA.

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Example No. 2 -- Sections 4.101 and 4.105

Chapter 4 of the Manual, entitled "Conducting Informal Hearings," includes provisions pertaining to the Negligent Operator Treatment System (NOTS). Section 4.101 of the Manual states, in part, the following:

"The Negligent Operator Treatment System begins when accidents and violations are added to a driver's record. Each driver's record is monitored[,] and when a poor record develops, a notice to the driver is generated automatically, informing the driver of the action the department intends to take."

Section 4.105 provides greater detail regarding NOTS, as follows:

"NOTS Level I, II, III, and IV

Drivers are notified of NOTS actions by mail through a computer generated letter. The referee does not become involved until a driver requests a hearing to discuss the validity of the NOTS suspension and probation action.

NOTS actions are divided into 4 levels:

Level I -A warning letter is sent to a driver whose record shows two points in 12 months.

Level II -A 'Letter of Intent to Suspend' is sent to a driver whose record shows three points in 12 months. The letter warns that additional violations or accidents will result in a suspension.

Level III -A notice of a twelve-month probation with a six-month suspension is sent to a driver whose record shows four points in 12 months, six points in 24 months, or eight points in 36 months. The probation lasts for twelve months. It begins when the suspension begins. (The driver may request a hearing.)

Level IV -A notice of revocation or of a 30 day, 60 day, 90 day, or six month suspension is sent to a driver who violates probation. The severity of the department's action depends on when, and how many times, the driver violated probation. (The driver may request a hearing.)"

Examining the relevant statutes, Vehicle Code section 12809 provides, in part, that the Department may refuse to issue or

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renew a license "[i]f the department determines that the applicant is a negligent or incompetent operator of a motor vehicle." Section 12810.5 states, in part, that "[a]ny person . . . whose driving record shows a violation point count of four or more points in 12 months, six or more points in 24 months, or eight or more points in 36 months shall be prima facie presumed to be a negligent operator of a motor vehicle."<sup>28</sup> Section 12810 designates the points assigned to particular types of traffic-related convictions, accidents, and other violations.

Pursuant to sections 13359 and 14250 of the Vehicle Code, the "negligent or incompetent operator" standard of Vehicle Code section 12809 is incorporated as grounds for license suspension, revocation, or probation. As a result, the violation point count system can be applied by the Department to license suspensions, revocations, and probations as well as license issuances and renewals.

Sections 4.101 and 4.105 of the Manual implement, interpret, or make specific Vehicle Code sections 12809, 12810, 12810.5, 13359, and 14250. Sections 12809, 13359, and 14250 provide that the Department "may" take certain actions (denial of license, revocation, suspension, and probation) if the driver is negligent. These statutes are not self-executing but rather are enabling and require implementation on the part of the Department. The Department has implemented these statutes by providing for an automatic notice, suspension, probation, and revocation system when a driver is considered prima facie negligent based upon violation point counts. Section 4.101 of the Manual says "[e]ach driver's record is monitored[,] and when a poor record develops, a notice to the driver is generated automatically." (Emphasis added.) This system implements the statute.

Furthermore, section 4.105 sets forth a detailed, four-level NOTS scheme involving a warning letter at Level I, a "Letter of Intent to Suspend" at Level II, a notice of a 12-month probation with a six-month suspension at Level III, and a notice of revocation or suspension sent to a driver violating probation at Level IV. This four-level NOTS scheme is not specifically provided for by the statutes but rather is a creation of the Department, the implementation and making specific of Vehicle Code sections 12809, 12810, 12810.5 and the other statutory sections discussed above. Furthermore, in addition to implementing the statutes, section 4.105 "governs the agency's procedure" by setting forth the Department's exact procedure for dealing with drivers accruing violation points.

We conclude that sections 4.101 and 4.105 of the Manual are "regulations" and must be adopted pursuant to the APA.

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Example No. 3 -- Section 7.115

Chapter 7 of the Manual, entitled "Making Decisions," describes the possible hearing decisions which can be made by a hearing referee and contains guidelines for making such decisions. Section 7.115 of the Manual provides the following:

"Limited Term

Issue a limited term license to a driver who drives safely now, but who has a degenerative disease that affects vision, muscular strength, or coordination. An examiner can evaluate such a driver sufficiently during a driving test. The examiner will refer the driver to a referee when the driver starts failing the required driving tests. Limited term licenses can be issued for a period of one to two years. If the driver needs testing in less than a year, use calendar re-examination."

Examining the relevant statute, Vehicle Code section 12508 states:

"Limited Term License

When in the opinion of the department it would be in the interest of safety, the department may issue, in individual cases, to any applicant for a driver's license, a license limited in duration to less than the regular term. Upon the expiration of a limited term license the department may extend its duration for an additional period without fee but the duration of the license and extensions shall not exceed the term of a regular license."

Section 7.115 of the Manual implements and makes specific Vehicle Code section 12508. This Vehicle Code section does not specify when a limited term license is appropriate and when such a license will be issued. Manual section 7.115, however, is specific, instructing the referee to "[i]ssue a limited term license to a driver who drives safely now, but who has a degenerative disease that affects vision, muscular strength, or coordination."

Furthermore, Vehicle Code section 12508 does not specify a particular term for a limited term license, except to say that the term is "less than the regular term."<sup>29</sup> Section 7.115 of the Manual, however, is specific as to the term of such a license, providing that limited term licenses "can be issued for a period of one to two years." It is evident, then, that section 7.115 implements, interprets, or makes specific Vehicle Code section 12508.

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We conclude that section 7.115 of the Manual is a "regulation" and must be adopted pursuant to the APA.

Example No. 4 -- Section 21.105

Chapter 21 of the Manual, entitled "Traffic Violator Schools," sets forth provisions pertaining to the granting of owner's, operator's, and instructor's licenses which are required for those persons owning, operating, or teaching in traffic violator schools. Pursuant to Vehicle Code section 42005, these schools provide instruction to persons convicted of traffic violations and to alleged traffic law violators in lieu of adjudicating traffic offenses. Vehicle Code sections 11200-11222 provide for the licensing of owners, operators, and instructors of traffic violator schools and for the general administration of these schools.

Section 21.105 of the Manual, entitled "Types of Applications," discusses the various types of licenses available to traffic violator school owners and instructors and the application process for each type of license. One type of instructor license discussed in this section is the "Additional Instructor License," applicable where a licensed instructor wishes to teach at more than one school. The section 21.105 provision relevant to this type of license is as follows:

"Additional Instructor License -- An already licensed instructor who wishes to work for more than one school must submit a letter from the employer who signed the instructor's original license application and a letter from the new employer. The letters must show each employer is aware of the instructor's employment at the other school." [Emphasis added.]

Examining the relevant statutes, Vehicle Code section 11206 sets forth the specific requirements for a traffic violator school instructor's license. This section provides the following:

"The department shall license traffic violator school instructors. . . . [N]o person shall act as a traffic violator school instructor without a currently valid instructor's license issued by the department. Every person, in order to qualify as a traffic violator school instructor, shall meet all of the following requirements before an instructor's license may be issued:

(a) Be a person who has not been convicted of a crime involving an act of dishonesty, fraud, or deceit with the intent to benefit himself or another substantially, or to injure another substantially. A conviction after a plea of nolo contendere is a conviction for purposes of this section.

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(b) Have a high school education.

(c) Within three attempts, pass an examination as required by the department, on traffic laws, safe driving practices, operation of motor vehicles, and teaching methods and techniques.

(d) Hold a currently valid California driver's license, which shall not be subject to probation pursuant to Section 14250 due to the applicant being a negligent operator within the meaning of Section 12810 or 12810.5. The applicant's driving record shall not have any outstanding notice for violating a written promise to appear in court or for willfully failing to pay a lawfully imposed fine, as provided in Section 40509.

(e) Be 18 years of age or older.

All the qualifying requirements specified by this section shall be met within one year from the date of application for a license or the application shall lapse . . . ."

Vehicle Code section 11207 provides that "[t]he department shall issue a license certificate to each traffic violator school instructor when it is satisfied that he or she has met the qualifications required under this chapter."

The statutes say nothing specific regarding additional licensing requirements or the licensing process applicable to an instructor desiring to teach at a second (or additional) school. Furthermore, although the Department has adopted a number of regulations in accordance with the APA pertaining to "Schools for Traffic Violators,"<sup>30</sup> these regulations are silent as to special requirements applicable to an instructor desiring an "additional license."

Manual section 21.105 implements, interprets, or makes specific the instructor licensing provisions of Vehicle Code sections 11206 and 11207. This Manual section supplements the statutes by imposing specific, additional licensing requirements and procedures on any instructor seeking to teach at more than one school. Under the applicable Manual provision, each such instructor must apply for an additional license, must obtain and submit a letter from the original employing school, must obtain and submit a letter from the new employing school, and must make certain that each letter submitted shows that the school is aware of the instructor's employment at the other school (thus necessitating a disclosure of the instructor's "other employment" to each of the schools).

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The "Additional Instructor License" provision of Manual section 21.105 clearly supplements (implements, interprets, or makes specific) the statutory scheme and also governs the Department's procedure. This provision of section 21.105 is a "regulation" and must be adopted pursuant to the APA.

WE CONCLUDE THAT CERTAIN PROVISIONS OF THE MANUAL ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.<sup>31, 32, 33, 34</sup> We conclude that none of the recognized APA exceptions (set out in footnote 31) apply to the provisions of the Manual that have been found to be regulatory.

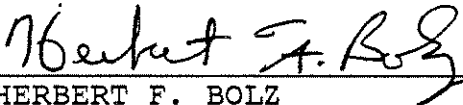
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### III. CONCLUSION

For the reasons set forth above, OAL finds that

- I. The "Driver Safety Manual" (1) is not a "regulation" as defined in the APA and (2) is not subject to the requirements of the APA insofar as it reiterates existing statutes, regulations, or case law.
- II. Certain provisions of the Driver Safety Manual which establish rules and procedures that implement, interpret, or make specific existing statutes, regulations, or case law (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) are therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the APA.

DATE: December 18, 1987

  
HERBERT F. BOLZ  
Coordinating Attorney

  
DEBRA M. CORNEZ  
Staff Counsel

  
BRADLEY J. NORRIS  
Staff Counsel

Rulemaking and Regulatory  
Determinations Unit

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- 1 This Request for Determination was filed by William T. Mayo, Attorney-at-Law, 660 Market Street, Suite 300, San Francisco, CA 94104, (415) 392-2800. The Department of Motor Vehicles was represented by William Mackey, Deputy Director of Operations, and Marilyn Schaff, Assistant Chief Counsel, 2415 First Street, Sacramento, CA 95818, (916) 732-7630.
- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CAC). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n.5, 211 Cal.Rptr. 758, 764 n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, \_\_\_, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute.
- 3 Title 1, CAC, section 121(a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342(b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from

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the requirements of the Act." [Emphasis added.]

- 4 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 5 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; type-written version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office's determination shall . . . be made available to . . . the courts." (Emphasis added.)
- 6 No public comments were received concerning this Request for Determination. The Department submitted a Response to the Request for Determination and it was considered in making this Determination.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.
- 7 An OAL finding that a challenged rule is illegal unless adopted "as a regulation" does not of course exclude the possibility that the rule could be validated by subsequent incorporation in a statute.
- 8 Pursuant to Title 1, CAC, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State.
- 9 Our conclusion that the Manual is not a "regulation" is based not only upon a finding that Manual provisions reiterate

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existing statutes, regulations, or case law, but also upon a finding that certain Manual provisions are simply "non-regulatory" in content. See footnote 22 for an example of non-regulatory sections of the Manual.

- 10 See OAL Determination, pp. 7-15 and note 24, below.
- 11 Stats. 1931, c. 478, sec. 1.
- 12 See Division 6 (Drivers' Licenses), sections 12500-15028 of the Vehicle Code.
- 13 We discuss the affected agency's rulemaking authority (see Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Administrative Code, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

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- 14 Government Code section 11342, subdivision (a). See Government Code sections 11343; 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
- 15 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 16 1987 OAL Determination No. 14 (Department of Motor Vehicles, October 26, 1987, Docket No. 87-003), California Administrative Notice Register 87, No. 45-Z, November 6, 1987, pp. 612-632.
- 17 Agency's Response, cover letter.
- 18 See Vehicle Code sections 13950-13954 and 14100-14112 for applicable notice and hearing provisions. Section 14100, in particular, specifies when a person is entitled to a hearing before the Department.
- 19 See Vehicle Code sections 13800-13801.
- 20 "Interviews" are defined in Manual sections 1.301 and 5.001.
- 21 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 22 An example of the "non-regulatory" sections of the Manual would be sections 17.001-17.061, involving referee "time management."
- 23 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 24 Additional examples of the regulatory content of the Manual are briefly mentioned below. Each of these provisions meets

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both prongs of the statutory definition of "regulation."

Section 2.317 -- Lapses of Consciousness

Section 2.317 specifies the content of a hearing involving the issue of a driver's (or aspiring driver's) lapses of consciousness. This section implements, interprets, or makes specific Vehicle Code sections 12805, 13359, 13800, 13801, 14100-14112, and 14250 and governs the Department's procedure.

Sections 4.209 and 4.213 -- First Violation of Probation and Repeated Violations of Probation

Sections 4.209 and 4.213 specify the exact periods of license suspension which will be imposed on drivers violating probation under the Negligent Operator Treatment System. Suspensions of 30 days, 60 days, 90 days, and 6 months are imposed with the suspension period dependent upon the particular length of time the driver has been on probation when the violation occurs, the number of violations, and the type of violations. This section implements, interprets, or makes specific Vehicle Code sections 12809, 12810, 12810.5, 13359, and 14250.

Section 5.005 -- Interviews for Drivers with Proof Codes O, X, and Y.

Section 5.005 provides: "To assure that drivers with a drinking or drug problem are not relicensed until the department has evidence the condition is controlled, a personal interview is required before reinstatement . . . . Reliable documentary evidence of sobriety is required, including reports from physicians, alcohol and drug rehabilitation programs, and parole and probation officers." These rules regarding the reinstatement of drivers with drinking or drug problems, requiring a personal interview and particular types of evidence, implement, interpret or make specific Vehicle Code sections 12805, 13101, 13102, 13359, 13551, and 13556.

Section 6.013 -- Procedure for Requesting Medical Information at a Re-examination

Section 6.013 pertains to re-examinations where evidence shows a driver has a medical problem which might affect safe driving. This section provides that the Department or referee may require a medical report from the driver. The driver is required to return the completed medical report within 10 days. Section 6.013 implements, interprets, or makes specific Vehicle Code sections 12805, 13800, and 13801.

Section 7.521 -- Eligibility for an Area Restriction

Section 7.521 specifies guidelines for determining when an area restriction (a restriction on a driver's license limiting the driver to operating in a particular geographic

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area) is appropriate or is inappropriate. This section implements, interprets, or makes specific Vehicle Code section 12813.

Section 10.017 -- Request for Hearing

Section 10.017 sets forth the procedures and requirements for requesting a Financial Responsibility hearing. Included in this section is the rule that "[a]ll Financial Responsibility hearings are scheduled as informal hearings unless a formal hearing is specifically requested." This rule implements, interprets, or makes specific Vehicle Code section 16075.

Section 13.025 -- Scheduling Class 1 and 2 Hearings

Section 13.025 pertains to hearings for drivers operating under Class 1 and Class 2 licenses (drivers qualified to operate vehicles such as large trucks and subject to heightened medical standards). This section provides the following: "If medical information comes to the department's attention . . . which disqualifies a driver to hold his or her Class 1 or 2 license, but does not disqualify the driver for a Class 3 or 4 license, a formal hearing . . . is scheduled. This is an exception to the demand hearing only practice." (Original emphasis.) This provision regarding the automatic scheduling of a formal hearing in the instance described above implements, interprets, or makes specific Vehicle Code sections 12804, 12805, 12809, 13359, and 14100-14112 and also governs the Department's procedure.

Sections 19.305 and 19.309 -- The Oath and Objections to the Oath

Sections 19.305 and 19.309 provide that an oath will be administered to witnesses in certain informal hearings and that the referee should overrule objections to the oath. This application of an oath requirement to informal hearings implements, interprets, or make specific Vehicle Code section 14104.

Section 19.317 -- Formal Order of Examination

Section 19.317 provides that formal hearings and certain informal hearings will follow a formal witness questioning pattern of direct examination, cross examination, re-direct examination, and re-cross examination as provided under section 772 of the Evidence Code. This incorporation of Evidence Code section 772 for the Department's formal hearings implements, interprets, or makes specific Vehicle Code sections 14108 and 14112 and Government Code section 11513. The incorporation of Evidence Code section 772 for certain informal hearings implements, interprets, or makes specific Vehicle Code section 14104.

Sections 21.013 and 21.201 -- Requirements for an Owner's License and Owner Checklist

Sections 21.013 and 21.201 relate to the application process

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for a traffic violator school owner's license. Section 21.013 provides, in part, that every applicant for an owner's license must "[s]ubmit a lesson plan (community colleges are exempted from this requirement if they submit a letter stating they will use the same lesson plan as the Los Angeles Community College District)." Section 21.201 instructs Department personnel reviewing an application for an owner's license that "[c]ommunity colleges not accredited in the past must submit a lesson plan or a letter stating they will be using the same lesson plan as the L.A. Community College District." This L. A. Community College District lesson plan equivalency option for meeting the lesson plan submission requirement implements, interprets, or makes specific Vehicle Code sections 11202 and 11204.

- 25 The examples of regulatory provisions discussed in this Determination are illustrative of regulations contained in the Manual and do not constitute an all-inclusive list of the regulatory content of the Manual. Due to time constraints, OAL cannot identify and discuss every "regulation" contained in the 653 Manual pages here at issue.
- 26 Although Manual section 2.309 applies to hearings, re-examinations, and interviews, we will limit our analysis here to the application of section 2.309 in the hearing context.
- 27 Section 14100 of the Vehicle Code provides that a driver receiving notice of specified Department actions (such as the refusal to issue or renew a license, or the imposition of license revocation, suspension or terms of probation) may, in writing and within 10 days, demand either an informal hearing or a formal hearing and that the Department shall grant such a hearing (except where a few exceptions apply).

Informal hearings are governed by Vehicle Code sections 14104-14106. Vehicle Code section 14104 provides that an informal hearing ". . . shall be conducted in a completely informal manner, the only requirement being that the applicant or licensee shall have the opportunity to make or file a written answer or statement in which he may controvert any point at issue or present any evidence or arguments for the consideration of the department, or the person may present orally to the department any evidence or statement pertinent to the question and submit the question for determination by the department."

Formal hearings, on the other hand, are governed by Vehicle Code sections 14107-14112. Section 14108 provides some general requirements on the subject of "Evidence at formal hearing." Section 14112, "Formal hearing procedure,"

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specifies that "[a]ll matters in a formal hearing not covered by this chapter shall be governed, as far as applicable, by the provisions of the Government Code relating to administrative hearings, and particularly by Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code." Pursuant to Vehicle Code section 14112, the Administrative Procedure Act's administrative hearing provisions are generally applicable to the Department's formal hearings.

- 28 The language of Vehicle Code section 12810.5 quoted here is the negligent operator violation point count system applicable to most drivers. Certain specialized classes of drivers are subject to a different point count system as set forth in section 12810.5, subdivision (b).
- 29 Vehicle Code section 12816 sets forth the "regular term" of drivers' licenses. In general, licenses expire on the license applicant's fourth birthday after date of application or, for renewals, the fourth birthday following the expiration of the license renewed.
- 30 See Title 13, CAC, sections 101.05-101.50.
- 31 The following provisions of law may permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:
  - a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
  - c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
  - d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
  - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

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- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning APA exceptions is contained in a number of previously issued OAL determinations. The Index of OAL Regulatory Determinations (available from OAL, (916) 323-6225) is a helpful guide for locating such information.

- 32 In the Agency Response, the Department asserted that a number of Manual sections are exempt from APA requirements because these sections involve "internal management of a state agency." The internal management exception to APA requirements is provided in Government Code section 11342, subdivision (b), which excludes from the definition of "regulation" any rule "which relates only to the internal management of the state agency." (Emphasis added.)

The internal management exception is narrow in scope and does not apply to agency policies which affect a class of persons other than the employees of the originating agency. See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal. Rptr. 596; and 1987 OAL Determination No. 9 (Department of Corporations, June 30, 1987, Docket No. 86-015), California Administrative Notice Register 87, No. 29-Z, July 17, 1987, pp. B-39--B-40; typewritten version pp. 12-14.

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The internal management exception does not apply to any of the regulation examples discussed in this Determination. Each regulation example involves a rule which affects a class of persons other than the employees of the Department.

- 33 In the Agency Response, the Department asserted that a number of Manual sections are exempt from APA requirements because these sections are "directed to a specific group." The Department is apparently referring to the APA exception contained in Government Code section 11343, subdivision (a)(3), for a regulation which is "directed to a specifically named person or to a group of persons and does not apply generally throughout the state." (Emphasis added.) It is clear that there is a two-pronged test for the exception to apply -- (1) the regulation must be directed to a specifically named persons or group of persons and (2) the regulation must not apply generally throughout the state.

Each of the regulation examples discussed in this Determination involves a rule which applies generally throughout the state. Consequently, each rule absolutely fails to qualify for the "specifically named person or group of persons" exception by failing to meet the second prong of the two-pronged exception test. Furthermore, it is doubtful whether any of these regulations -- regulations which are applicable to all members of an "open class" -- could be construed as being "directed to a specifically named person or group of persons."

See the discussion of this exception in 1987 OAL Determination No. 9 (Department of Corporations, June 30, 1987, Docket No. 86-015), California Administrative Notice Register 87, No. 29-Z, July 17, 1987, pp. B-40--B-41; typewritten version pp. 14-15.

For the reasons set forth above, the "specifically named person or group of persons" exception does not apply to any of the regulation examples discussed in this Determination.

- 34 In the Agency Response, the Department asserted that a number of Manual sections are exempt from APA requirements because these sections involve "forms" or "forms use." The "forms exception" is contained in the following sentence from the "regulation" definition in Government Code section 11342, subdivision (b):

"'Regulation' does not mean or include . . . any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation

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be adopted pursuant to this part when one is needed to implement the law under which the form is issued."  
[Emphasis added.]

Although forms themselves may not need to be adopted pursuant to the APA, it is very clear from the second clause of the forms exception language quoted above that the exception does not apply to agency rules which "implement the law under which the form is issued." Consequently, case law interpreting the forms exception indicates that (1) embedding rules or interpretations within a form does not insulate the rules from APA requirements, and (2) the use of a form resulting in a regulatory effect does not insulate the regulation from APA requirements. See City of Santa Barbara v. California Coastal Zone (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361; and Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 737-738, 188 Cal.Rptr. 130, 135-136.

See also the extensive discussion regarding the "use of forms in state government" in 1987 OAL Determination No. 16 (Board of Behavioral Science Examiners, December 4, 1987, Docket No. 87-005), California Administrative Notice Register 87, No. 52-Z, December 25, 1987, pp. 1058-1064; typewritten version pp. 21-27.

The forms exception does not apply to any of the regulation examples discussed in this Determination.